91-1441

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

SHWC, INC., J.W. HIESTER, D.M. WILSON, AND E.L. SWANSON, *PETITIONERS*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, AS RECEIVER FOR VERNON SAVINGS AND LOAN ASSOCIATION, FSA, *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court or the Fifth Circuit may legislate to provide for jurisdiction of the Federal Court when FIRREA establishes no successor to the Federal Savings & Loan Insurance Corporation for receiverships created prior to January 1, 1989, while the same courts refuse to add to FIRREA to provide for jurisdiction of the Federal Court when administrative remedies for claims have not been exhausted.

2. Whether the Fifth Circuit may disregard its time-honored standards to determine the existence of a partnership from loan documents because of a crisis in the savings and loan industry, holding by implication that what may be the law for ordinary people cannot be the law for the government.

3. Whether the Fifth Circuit's holding that the declaration of an intent not to violate the usury statutes saves an otherwise clear charge of usurious interest is a judicial attempt to retrospectively modify contract rights in violation of Article I of the Constitution.

4. Whether the Fifth Circuit's holding that Texas usury statutes, being punitive in nature, cannot be asserted against the FDIC, can be upheld since it is in direct conflict with the Ninth Circuit's opinion in *FDIC v. Bank of America Nat'l Trust & Savings Assn.*, 701 F.2d 831, 834 (9th Cir.), *cert denied*, 464 U.S. 935, 104 S. Ct. 343, 78 L.Ed.2d 310 (1983).

II

PARTIES TO THE PROCEEDING

The petitioners in this case are SHWC, Inc.,[1] J. W. Hiester, L. E. Swanson, and D. M. Wilson. L. L. Claycomb, a Defendant in the litigation, did not appeal from the District Court judgment, but retains an indemnity from SHWC, Inc. The respondent is the Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, as Receiver for Vernon Savings & Loan Association, FSA. The Federal Deposit Insurance Corporation, in its corporate capacity, if a party separate from its Receivership capacity, may have succeeded to the partnership interest in Meadowstone Condominiums which previously belonged to Vernon Savings & Loan Association.

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[1] The parent of SHWC, Inc. is HCO, Inc. SHWC, Inc. has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHWC, Inc., J. W. Hiester, D. M. Wilson, and E. L. Swanson petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 16a-33a) is reported at 945 F.2d 853. The opinion of the United States District Court for the Northern District of Texas (App., *infra*, 1a-11a) is unreported.

JURISDICTION

The district court entered its opinion on April 18, 1990 (App., *infra*, 10a-11a), and its judgment on May 29, 1990 (App., *infra*, 13a). On August 1, 1990, the district court denied

petitioners' motion for rehearing (App., *infra*, 15a). On October 23, 1991, the Fifth Circuit Court of Appeals issued its opinion affirming the district court's judgment (App., *infra*, 33a), and, on January 6, 1992, the Fifth Circuit denied petitioner's motion for rehearing (App., *infra*, 34a-35a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the United States Constitution provides:

> No State shall. . . pass any . . Law impairing the Obligation of Contracts, . . .

Section 501(b) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a(b), provides, in pertinent part:

> (b) RESOLUTION TRUST CORPORATION ESTABLISHED. —
>
> (1) ESTABLISHMENT.—
>
> (A) IN GENERAL. — There is hereby established a Corporation to be known as the Resolution Trust Corporation which shall be an instrumentality of the United States.
>
> (B) STATUS. — The Corporation shall be deemed to be an agency of the United States for purposes of subchapter II of chapter 5 and chapter 7 of title 5, United States Code, when it is acting as a corporation. The Corporation, when it is acting as a conservator or receiver of an insured depository institution, shall be deemed to be an

agency of the United States to the same extent as the Federal Deposit Insurance Corporation when it is acting as a conservator or receiver of an insured depository institution.

(C) FDIC AS EXCLUSIVE MANAGER. — Immediately upon enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Federal Deposit Insurance Corporation shall be authorized to and shall perform all responsibilities of the Corporation, and shall continue to do so unless removed pursuant to subsection (m)....

(6) SUCCESSOR TO FSLIC AS CONSERVATOR OR RECEIVER. — As of the date of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Corporation shall succeed the Federal Savings and Loan Insurance Corporation as conservator or receiver with respect to any institution for which the Federal Savings and Loan Insurance Corporation was appointed conservator or receiver during the period beginning on January 1, 1989 and ending on such date of enactment.

Section 215 of FIRREA, 12 U.S.C. § 1821a, provides:

SEC. 215. FSLIC RESOLUTION FUND.

The Federal Deposit Insurance Act is amended by inserting after section 11 the following:

SEC. 11A. FSLIC RESOLUTION FUND.

(a) ESTABLISHED.—

(1) IN GENERAL. — There is established a separate fund to be designed as the FSLIC Resolution Fund which shall be managed by the Corporation and separately maintained and not commingled.

(2) TRANSFER OF FSLIC ASSETS AND LIABILITIES.—

(A) IN GENERAL. — Except as provided in Section 21A of the Federal Home Loan Bank Act, all assets and liabilities of the Federal Savings and Loan Insurance Corporation on the day before the date of the enactment of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 shall be transferred to the FSLIC Resolution Fund.

...

(b) SOURCE OF FUNDS. — The FSLIC Resolution Fund shall be funded from the following sources to the extent funds are needed in the listed priority:

(1) Income earned on assets of the FSLIC Resolution Fund.

(2) Liquidating dividends and payments made on claims received by the FSLIC Resolution Fund from receiverships to the extent such funds are not required by the Resolution Funding Corporation pursuant to section 21B of the Federal Home Loan Bank Act or the Financing Corporation pursuant to section 21 of such Act.

(3) Amounts borrowed by the Financing Corporation pursuant to section 21 of the Federal Home Loan Bank Act.

(4) During the period beginning on the date of the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and ending on December 31, 1991, amounts assessed against Savings Association Insurance Fund members by the Corporation pursuant to section 7 which are not required by the Financing Corporation pursuant to section 21 of the Federal Home Loan Bank Act or by the Resolution Funding Corporation pursuant to section 21B of the Federal Home Loan Bank Act.

Section 401(f) of FIRREA, see notes after 12 U.S.C. § 1437 (Repealed), provides:

(f) SAVINGS PROVISIONS RELATING TO FSLIC. —

(1) EXISTING RIGHTS, DUTIES AND OBLIGATIONS NOT AFFECTED. — Subsection (a) shall not affect the validity of any right, duty or obligation of the United States, the Federal Savings and Loan Insurance Corporation, or any other person which —

(A) arises under or pursuant to any section of title IV of the National Housing Act; and

(B) existed on the day before the date of enactment of this Act.

(2) CONTINUATION OF SUITS. — No action or other proceeding commenced by or against the Federal Savings and Loan Insurance Corporation, or any Federal home loan bank with respect to any function of the

Corporation which was delegated to employees of such bank, shall abate by reason of the enactment of this Act, except that the appropriate successor to the interests of such Corporation shall be substituted for the Corporation or the federal home loan bank as a party to any such action or proceeding.

Section 403(b)(1) of FIRREA, see notes after 12 U.S.C. § 1437 (Repealed), provides:

(b) FUNCTIONS AND EMPLOYEES TRANSFERRED.—

(1) IN GENERAL. — The Director of the Office of Thrift Supervision, the Chairperson of the Oversight Board of the Resolution Trust Corporation, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the Federal Housing Finance Board, and the Chairman of the Federal Home Loan Bank Board (as of the day before the date of the enactment of this Act) shall jointly determine the functions or activities of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, and the number of employees of such Board and Corporation necessary to perform or support such functions or activities, which are transferred from the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation to the Office of Thrift Supervision, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or the Federal Housing Finance Board, as the case may be.

Section 403(d) of FIRREA, see notes after 12 U.S.C. § 1437 (Repealed), provides:

> (d) FSLIC EMPLOYEES ENGAGED IN CONSERVATORSHIP OR RECEIVERSHIP FUNCTIONS. — Individuals who, on the day before the date of the enactment of this Act, or employed by the Federal Savings and Loan Insurance Corporation in such Corporation's capacity as conservator or receiver of any insured depository institution shall be treated as employees of the Federal Savings and Loan Insurance Corporation for purposes of determining, pursuant to subsection (b)(1), the number of employees performing or supporting functions or activities of such Corporation if such conservatorship or receivership is transferred to the Federal Deposit Insurance Corporation or the Resolution Trust Corporation.

STATEMENT

On December 7, 1986, Vernon Savings & Loan Association, a Texas savings and loan association in Dallas, Texas ("Vernon") filed a lawsuit in the state district court in Dallas County against L. L. Claycomb, J. W. Hiester, D.M. Wilson, L. E. Swanson, and SHWC, Inc. on two deed of trust notes from SHWC to Vernon, which notes were guaranteed in part by the other four Defendants. During the pendency of the state court suit, Vernon was declared insolvent by the Federal Home Loan Bank Board ("FHLBB"). The Federal Savings & Loan Insurance Corporation ("FSLIC") was appointed receiver and transferred Vernon's assets to a new entity, Vernon Savings & Loan Association, FSA ("Vernon FSA"). Subsequently, Vernon FSA was declared insolvent. On December 16, 1987, FSLIC filed a Notice of Substitution of the FSLIC as Receiver for Vernon, FSA,

and filed a Petition for Removal to the United States District Court. No motion to substitute Vernon, FSA, for Vernon had ever been filed. Defendants filed motions to remand, but the District Court denied them.

The Federal Deposit Insurance Corporation ("FDIC"), after being substituted in October of 1989 as Plaintiff as the purported manager of the FSLIC Resolution Fund as Receiver for Vernon FSA, and putative successor to the FSLIC as Receiver for Vernon, FSA, filed a Motion for Summary Judgment. Petitioners raised arguments of jurisdiction, usury, and partnership. The loan documents between SHWC and Vernon reflected that neither SHWC nor the guarantors had personal or corporate liability for more than one-half the total of all such amounts which are outstanding from time to time. As part of the loan transaction SHWC granted Vernon a 50% profits interest in the property. Therefore petitioners asserted that, based upon the loan documents, a partnership exists, that the profits or partnership interest and application of payments constitute usury, and that simple credit of receipts as required by the loan documents and appropriate accounting discharge petitioners' indebtedness to Vernon.

The district court in its Memorandum Opinion granted the FDIC's Motion for Summary Judgment, and entered its judgment on May 29, 1990. (App., *infra*, 10a-11a) The district court did not consider the limitation of petitioners' liability to be an agreement to share losses, and found that the disavowal of partnership contained in the documents outweighed the rest of the profits assignment, loan agreement and notes, guaranties and deeds of trust. (App., *infra*, 4a-6a) As to the usury claims, the district court relied upon the savings clauses, without further analysis, (App., infra, 10a) and granted summary judgment. (App., infra, 10a-11a) Petitioners filed a motion for new trial, and the district

court denied that motion by order dated August 1, 1990. (App., infra, 15a)

In its appeal to the Fifth Circuit Court of Appeals, Petitioners argued that while FIRREA clearly provides for the substitution of the Resolution Trust Corporation for FSLIC as conservator or receiver on or after January 1, 1989, FIRREA is silent and contains no provision for the substitution of any entity for FSLIC in cases where FSLIC was appointed conservator or receiver prior to January 1, 1989. Therefore, because neither the FDIC, the FSLIC Resolution Fund, nor the Resolution Trust Corporation may appropriately pursue claims in this suit, the district court had no jurisdictional power to adjudicate the FDIC's claims and should have remanded those claims to state court or dismissed them for want of jurisdiction. Petitioners argued that under Fifth Circuit precedent, the loan documents themselves created a partnership by operation of law, or in themselves create a usurious charge for the use of money, and that payments received by Vernon from SHWC and funds Vernon required SHWC to expend should have been allocated to the "one-half" for which SHWC had liability.

The court of appeals affirmed the district court's conclusion that a limitation of borrower liability does not constitute an agreement to share losses, and stated that the express disavowal of intent to become a partner with SHWC, together with the absence of an express provision to share losses indicates that a partnership was not intended. (App., *infra*, 25a-27a) The Court did not address its prior holding in *Minute Maid Corp. v. United Foods, Inc.*, 291 F.2d 577 (5th Cir.), *cert denied, United States Cold Storage Corp. v. Minute Maid Corp.*, 368 U.S. 928, 828 S. Ct., 7 L.Ed. 2d 192 (1961). The court held that the savings clauses contained in the loan documents defeated any usury defense

under Texas law (App., *infra*, 29a-31a), and further held that the usury claim, which is punitive in nature under Texas law, cannot be asserted against the FDIC. (App., *infra*, 31a-32a) The court likewise overruled petitioners' jurisdiction argument, holding that under that theory, "there would be no successor to the FSLIC for institutions placed in receivership prior to the enactment of FIRREA. The court finds no indication in the statute that Congress intended to abolish all pre-FIRREA receiverships. Congress' intent was apparently otherwise." (App., *infra*, 26a) Petitioners filed a Motion for Rehearing, which the court denied on January 6, 1992. (App., *infra*, 34a-35a)

ARGUMENT

I. WHETHER THE DISTRICT COURT OR THE FIFTH CIRCUIT MAY LEGISLATE TO PROVIDE FOR JURISDICTION OF THE FEDERAL COURT WHEN FIRREA ESTABLISHES NO SUCCESSOR TO THE FEDERAL SAVINGS & LOAN INSURANCE CORPORATION FOR RECEIVERSHIPS CREATED PRIOR TO JANUARY 1, 1989, WHILE THE SAME COURTS REFUSE TO ADD TO FIRREA TO PROVIDE FOR JURISDICTION OF THE FEDERAL COURT WHEN ADMINISTRATIVE REMEDIES FOR CLAIMS HAVE NOT BEEN EXHAUSTED.

When FDIC sought to substitute itself for the FSLIC in this case, it claimed to be the manager of the FSLIC Resolution Fund as Receiver for Vernon FSA, and asserted that it was the successor-in-interest of FSLIC receiver. FDIC made no reference to any specific statutory provision, as indeed it could not. While FIRREA clearly provides for the substitution of the Resolution Trust Corporation ("RTC") for cases in which FSLIC was

appointed conservator or receiver on or after January 1, 1989, FIRREA is silent and contains no provision for the substitution of any entity for FSLIC in cases where FSLIC was appointed conservator or receiver prior to January 1, 1989.

Section 501(b) of FIRREA creates RTC and names FDIC as its manager. Section 501(b)(6) of FIRREA specifically provides that the RTC shall be the successor of FSLIC as conservator or receiver in cases where FSLIC is appointed conservator or receiver on or after January 1, 1989. There is no similar statutory provision in FIRREA that substitutes FDIC or any other entity as conservator or receiver for cases in which FSLIC was appointed conservator or receiver prior to January 1, 1989.

The present case involves a savings association closed prior to January 1, 1989, for which FDIC claims to be acting as manager for the FSLIC Resolution Fund. Section 215 of FIRREA creates the FSLIC Resolution Fund and funds it with the assets of FSLIC corporate. Assets of each of the FSLIC receiverships do not become part of the FSLIC Resolution Fund. The statutory scheme mandates that the FSLIC Resolution Fund be comprised of all of the assets of FSLIC corporate. Section 215 further provides that the source of funds for the FSLIC Resolution Fund shall be derived from (1) income earned on assets of the FSLIC Resolution Fund, (2) liquidating dividends and payments made on claims received by the FSLIC Resolution Fund from receiverships to the extent such funds are not required by the Resolution Funding Corporation pursuant to section 21B of the Federal Home Loan Bank Act or the Financing Corporation pursuant to Section 21 of such Act, (3) amounts borrowed by the Financing Corporation pursuant to section 21 of the Federal Home Loan Bank Act, and (4) additional amounts assessed against savings associations pursuant to FIRREA. Under section 215, the primary funding for

the FSLIC Resolution Fund comes from the claims of FSLIC corporate against the FSLIC receiverships. Section 215 recognizes the distinction between FSLIC in its capacity as receiver and FSLIC in its corporate capacity. This distinction is further reinforced by Section 401(f) of FIRREA.

It appears from FIRREA that Congress did not necessarily intend to transfer all duties of FSLIC as receiver to either the FDIC, the FSLIC Resolution Fund, or the RTC. For example, Section 403 provides that all FHLBB and FSLIC employees shall be identified for transfer under that section to the FDIC, the Office of Thrift Supervision, or the Federal Housing Finance Board. Section 403(b)(1) provides that the director of the Office of Thrift Supervision, the Chairman of the Oversight of the Resolution Trust Corporation, the Chairperson of the FDIC, the Chairperson of the Federal Housing Finance Board, and the Chairman of the Federal Home Loan Bank Board shall jointly determine the functions or activities of the FHLBB and the FSLIC and the number of employees of such board or corporation necessary to perform the functions or activities which are transferred from the FHLBB and the FSLIC to the Office of Thrift Supervision, the RTC, the FDIC, or the Federal Housing Finance Board. Section 403(d) makes special provision for FSLIC employees engaged in receivership functions *if such conservatorship or receivership is transferred* to the FDIC or the RTC. Notwithstanding the appellate court decision, based on Section 403(d), it appears that Congress did not necessarily intend to transfer all conservatorship or receivership functions of FSLIC to either the FDIC or the RTC.

Absent a clear statutory provision substituting the FDIC or the FSLIC Resolution Fund as a party to this civil action, FDIC cannot invoke FIRREA as a jurisdictional basis for pursuing Vernon's claims against petitioners in this suit. For receiverships

that existed prior to January 1, 1989, Congress has failed to enact any provision which would substitute the FDIC in any capacity (or any other entity) for FSLIC as receiver or conservator. Therefore, because neither the FDIC, the FSLIC Resolution Fund, nor the RTC may appropriately pursue claim in this suit as a Plaintiff below, the district court had no jurisdictional power to proceed to adjudicate the FDIC's claims and should have remanded those claims to state court or dismissed them for want of jurisdiction.

The court of appeals held in its opinion that "in light of FIRREA, we see nothing to divest the district court of jurisdiction." (App., *infra*, 25a) Faced with the identical issue in *FSLIC v. Mackie*, 949 F.2d 818, 822, n.4 (5th Cir. 1992), the court stated:

> In his reply brief, Mackie argues that there is a gap in FIRREA, in that it substitutes the RTC as receiver for any receiverships created on or after January 1, 1989. FIRREA does not substitute any entity for the FSLIC in any capacity. Thus, Mackie argues that FIRREA does not extend federal jurisdiction to cases in which FSLIC is a party. We hold, however, that despite this gap, FIRREA does apply retroactively to grant federal jurisdiction over cases in which the FSLIC is a party.

As stated in *In re Shear*, 139 F. Supp. 217, 221 (N.D. Cal. 1956), "Courts are not at liberty to amend or repeal a statute under a guise of construction,... nor is it within the judicial function of a court to supply omissions in a statute, even though that which was omitted may have been omitted by oversight or inadvertence.... It is not for a court to extend the scope of a statute beyond the point where Congress indicated it would stop." (citing *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 57 S. Ct. 356, 81 L.

Ed. 532 (1937); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 56 S. Ct. 70, 80 L.Ed. 62 (1935); *Wallace v. Cutten*, 298 U.S. 229, 56 S. Ct. 753, 80 L. Ed. 1157 (1936); *Iselin v. United States*, 270 U.S. 245, 46 S. Ct. 248, 70 L.Ed. 566 (1926); and *Ebert v. Poston*, 266 U.S. 548, 45 S.Ct. 188, 69 L.Ed. 435 (1925). Justice Brandeis, writing for the Supreme Court, rejected such an argument:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Iselin v. United States, 270 U.S. 245, 250-251, 46 S. Ct. 248, 70 L. Ed. 566 (1926), *cited in West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S. Ct. 1138, 113 L.Ed.2d 68 (1991). The Seventh Circuit in *Busse v. Commissioner*, 479 F.2d 1147, 1152 (7th Cir. 1973) noted: "Courts have no power... 'to rewrite legislative enactments to give effect to' their 'ideas of policy and fitness or the desirability of symmetry in statutes.' *United States v. Shirah*, 253 F.2d 798, 800 (4th Cir. 1958). The powers of repeal and amendment are uniquely legislative in their nature." *Id.* See also, *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1269 (6th Cir. 1989); *Heater v. Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974); *Tracy Leigh Dev. Corp. v. Govt. of the Virgin Islands*, 501 F.2d 439 (3d Cir. 1974); *Manufacturers Hanover Trust Co. v. Commissioner*, 431 F.2d 664 (2d Cir. 1970); *Toilet Goods Assn. v. Finch*, 419 F.2d 21 (2d Cir. 1969); United States v. W.T. Rawleigh Co., 267 F.2d 180 (7th Cir. 1959); *Fisher Flouring Mills Co. v. United States*, 270 F.2d

27 (9th Cir. 1959); *Busey v. Deshler Hotel Co.*, 130 F.2d 187 (6th Cir. 1942).

In *Addison v. Holly Hill Fruit Products*, 322 U.S.607, 617, 64 S. Ct. 1215, 1221, 88 L.Ed. 1488 (1944), this court held:

> Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by references to difficulties in administration.'

Mr. Justice Frankfurter's comments in "*The Reading of Statutes*," 47 Col. L. Rev. 527, 534 (1947), "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion" were quoted in *Carr-Consolidated Biscuit Co. v. Moore*, 125 F. Supp. 423, 432, n.25 (M.D. Pa. 1954), and *United States v. Ganaposki*, 72 F. Supp. 982, 985 (M.D. Pa. 1947).

It is especially ironic that the court of appeals resorted to judicial legislation to provide for federal court jurisdiction in this instance when there is admittedly a "gap" in FIRREA, because in *Meliezer v. RTC*, 952 F.2d 879 (5th Cir. 1992), the court admitted that although FIRREA "does not explicitly mandate exhaustion of administrative remedies before judicial intervention," neither does FIRREA contain a "provision granting Federal jurisdiction to claims filed after a receiver is appointed but before administrative exhaustion." The court in that instance found that Congress had

intended to omit such a provision, and affirmed the district court's dismissal of the case for lack of jurisdiction.

Congress omitted to provide for jurisdiction for receiverships appointed prior to January 1, 1989, just as it omitted to provide for jurisdiction for claims filed after a receiver is appointed but before administrative exhaustion. The court should not legislate in either instance.

II. WHETHER THE FIFTH CIRCUIT MAY DISREGARD ITS TIME-HONORED STANDARDS TO DETERMINE THE EXISTENCE OF A PARTNERSHIP FROM LOAN DOCUMENTS BECAUSE OF A CRISIS IN THE SAVINGS AND LOAN INDUSTRY, HOLDING BY IMPLICATION THAT WHAT MAY BE THE LAW FOR ORDINARY PEOPLE CANNOT BE THE LAW FOR THE GOVERNMENT.

The court of appeals failed to mention its seminal case on the partnership issue, *Minute Maid Corp. v. United Foods, Inc.*, *supra*. Admittedly *Minute Maid* was a case involving two merchants, neither of whom were insured by an agency of the government. Nevertheless, the facts were very similar. There was no agreement to share losses, but the court held that not to be controlling. There was an agreement to share profits of the venture, and the venture was different from the business ventures of either merchant. The court emphasized the importance of control of the venture, and held that the question was not whether the control was indicative of the type of control a lender might have over a borrower, but rather was the control enough control to constitute a partnership.

Here the court of appeals, because of the much-publicized financial crises in the country, was not willing to hold a savings and loan association to the same standards it imposed upon a merchant. It held that the absence of an agreement to share losses, coupled with a disavowal of intent to become a partner prevented a partnership from forming. The court in *In re Medallion Realty Trust*, 103 Bankr. 8, 13 (Bankr. D. Mass 1989), *aff'd*, 120 Bankr. 245 (D. Mass. 1990), held that the entities there "may not have considered themselves partners.... The only necessary intention, however, is an intent to do those things which constitute a partnership. The law fixes the legal consequences which flow from the conduct of the parties."

The court of appeals has provided one law for the lion and another for the ox, retrospectively changing long-standing, accepted and recognized commercial contractual expections.

III. WHETHER THE FIFTH CIRCUIT'S HOLDING THAT THE DECLARATION OF AN INTENT NOT TO VIOLATE THE USURY STATUTES SAVES AN OTHERWISE CLEAR CHARGE OF USURIOUS INTEREST IS A JUDICIAL ATTEMPT TO RETROSPECTIVELY MODIFY CONTRACT RIGHTS IN VIOLATION OF ARTICLE I OF THE CONSTITUTION.

The court of appeals incorrectly stated in its opinion that "SHWC does not contend that the note is facially usurious or that the transaction is usurious even if the savings clause is applied." (App., *infra*, 31a) Petitioners at all times maintained those contentions. Whether the note was facially usurious depended upon the valuation of the profits interest at the time of execution, the insurance policies assigned, the assignment of rents, taken

together with the total amount of interest, payable at a variable rate, and the loan finance charges. No attempt was made by the FDIC to prove that the note was not usurious by its very terms, although on a Motion for Summary Judgment, the FDIC clearly had the burden to do so where usury was affirmatively pleaded as a defense.

SHWC paid money to Vernon which Vernon credited to the fifty percent of the loan which Vernon did not owe. Such amounts were interest, and if the savings clause is applied, should be credited to reduce the half of the principal, if any, owed by SHWC. Amounts charged under the judgment which are not owed (such as the demand for 100% of the attorneys' fees, instead of half, pursuant to the loan documents) constitute the charge of usurious interest. A court retrospectively alters contract rights if it holds that a savings clause prevents the charging of interest, and then refuses to apply the savings clause itself, and when it does so under state law, it violates Article I of the Constitution.

IV. WHETHER THE FIFTH CIRCUIT'S HOLDING THAT TEXAS USURY STATUTES, BEING PUNITIVE IN NATURE, CANNOT BE ASSERTED AGAINST THE FDIC, CAN BE UPHELD SINCE IT IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S OPINION IN *FDIC V. BANK OF AMERICA NAT'L TRUST & SAVINGS ASSN.*, 701 F.2D 831, 834 (9TH CIR.), *cert denied*, 464 U.S. 935, 104 S. CT. 343, 78 L.ED.2D 310 (1983).

The court of appeals held that Texas usury statutes are punitive in nature and cannot be asserted against the FDIC. (App., *infra*, 31a-32a) This holding is directly contrary to the Ninth Circuit's holding in *FDIC v. American Nat'l Trust & Savings*

Assn., supra, which held that state law determines the liability of the FDIC as receiver. Since this action was brought by the FDIC as receiver of the failed Vernon, the defense of usury is valid. See also, *FDIC v. Renda*, 692 F. Supp. 128, 134 (D. Kan. 1988).

CONCLUSION

In the absence of a clear legislative mandate, a court should not depart from the uniform application of the law merely because the FDIC, rather than a private litigant, pursues claims for relief. In any event, the confusion created by the split in the circuit courts of appeal and the district courts should be resolved and the petition for a writ of certiorari should be granted.

DATED this 5th day of March, 1992.

Respectfully submitted,

CAMILLE R. McLEOD
JOHNSON & GIBBS, P.C.

CHRISTOPHER M. WEIL,
WEIL & PETROCCHI, P.C.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action
No. CA3-87-2955-D

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, AS RECEIVER FOR VERNON SAVINGS AND LOAN ASSOCIATION, FSA, Plaintiff

v.

L. L. CLAYCOMB, J. W. HIESTER, E. L. SWANSON, D. M. WILSON, and SHWC, INC., Defendants

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April 18, 1990

Memorandum Opinion and Order

The Federal Deposit Insurance Corporation ("FDIC"), acting as Manager of the FSLIC Resolution Fund and as Receiver for Vernon Savings and Loan Association, F.S.A. ("New Vernon"), moves the court to reconsider a prior ruling and for summary judgment. For the reasons that follow, the motions are granted.

I

This action to recover on certain promissory notes and guaranties was initiated in Texas state court by Vernon Savings and Loan Association ("Old Vernon") in 1986. Old Vernon filed suit to recover on two promissory notes executed by defendant SHWC, Inc. ("SHWC") in favor of Old Vernon and guarantied by individual defendants L.L. Claycomb ("Claycomb"), J.W. Heister ("Heister"), E.L. Swanson ("Swanson"), and D.M. Wilson ("Wilson"). Note 1 was executed by SHWC in the original principal amount of $10 million on April 18, 1984. On the same date SHWC executed Note 2 in the original principal amount of $1.25 million. Each note provided that SHWC's liability would be limited to "one-half the total of all such amounts which are outstanding from time to time." The individual defendants guarantied payment under both notes, likewise limiting their liability to one-half the total amount outstanding. The notes were secured by two deeds of trust on certain Dallas County property.

The notes lapsed into default in April 1986. This action followed. New Vernon subsequently acquired the notes and guaranties via a purchase and assumption transaction with the Federal Savings and Loan Insurance Corporation ("FSLIC"). When New Vernon failed, the FSLIC stepped in as receiver and reacquired the relevant assets. The FSLIC then intervened in the state action and removed the action to this court.

One June 29, 1989 the court denied the FSLIC's motion for summary judgment. The court concluded the FSLIC had established its right to recover, but determined summary judgment was not proper because the court could not determine from the summary judgment record the legal relationship of the parties based on a profits assignment given to Old Vernon by SHWC.

Vernon Sav. & Loan Ass'n, F.S.A. v. Claycomb, No. CA3-87-2955-D, slip op. at 9 (N.D. Tex. June 29, 1989). The FDIC[1] now moves the court to reconsider its prior ruling, and again moves for summary judgment, contending the protections afforded the FDIC by the D'Oench, Duhme[2] and federal holder in due course doctrines preclude a partnership or joint venture finding. The FDIC alternatively contends no partnership existed under state law, and additionally argues it is not liable for usury. Defendants respond that a partnership existed between SHWC and Old Vernon, and aver they are excused from their debts by virtue of this relationship. Defendants also assert summary judgment is not proper because a fact issue exists as to the amount of the guarantors' liability.

II

A

The court first considers the FDIC's motion to reconsider.

The FDIC's motion centers on the legal effect of an April 18, 1984 profits assignment delivered by SHWC to Old Vernon. SHWC and the individual defendants contend the profits assignment created a partnership between the parties created fiduciary obligations later breached by Old Vernon. The FDIC responds that, because the profits assignment expressly disavows the existence of a partnership, such a relationship could only be established by resort to proof of a side agreement. The FDIC

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[1] Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 1989 U.S. Code Cong. & Admin. News (103 Stat.) 286 (1989), the FDIC, as manager of the FSLIC Resolution Fund, and as statutory successor to the FSLIC as Receiver for New Vernon, has been substituted as plaintiff.

[2] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

reasons that the D'Oench, Duhme doctrine bars this evidence, and therefore concludes the "partnership" defense/claim fails as a matter of law. The FDIC alternatively contends no partnership was created under state law.

Because the court did not consider the status of the parties' relationship under state law in its prior ruling, it is to that questions the court turn first. Under Texas law, a partnership is an association of two or more persons to carry on as co-owners a business for profit. TEX. REV. CIV. STAT. ANN. art. 6132b § 6(1) (Vernon 1970). While the intention of the parties is an important factor in determining the existence of a partnership, e.g., Medallion Homes, Inc. v. Thermar Inv., Inc., 698 S.W.2d 400, 404 (Tex. App. 1985, no writ), disapproved of on other grounds, Ojeda de Toca v. Wise, 748 S.W.2d 449, 450 (Tex. 1988), also considered are agreements to share profits and losses, community of interest, and a mutual right of control or management. Id. The absence of an express provision obligating the parties to share in the losses is indicative that a partnership was not intended. Gutierrez v. Yancey, 650 S.W.2d 169, 172 (Tex. App. 1983, no writ).

Here, the profits assignment contained a provision whereby Old Vernon expressly disavowed any intent to become a partner with SHWC.[3] Notwithstanding this disclaimer, SHWC contends

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[3] Section 4.03 of the profits assignment provides:

> By its acceptance of this Profits Assignment, Assignee (Old Vernon) does not become a member or partner of or with Assignor (SHWC). Consequently, in no event shall Assignee be liable for any of the debts, obligations, or liabilities of Assignor or of its partners as a result of

the profits assignment, considered together with the promissory notes, guaranties, and deeds of trust, reflect the existence of a partnership. The court's review of the summary judgment record indicates otherwise.

The unmistakable intent of the parties to the transactions at issue was to create a relationship whereby Old Vernon would provide loans to SHWC and SHWC would agree to repay those loans with interest. Additionally, as consideration for the making of the loans, SHWC agreed to pay Old Vernon a portion of the profits generated by the property developed with the borrowings. The loan documents at issue do not refer to or evidence in any way the existence of a partnership. Nor do the documents contain any reference to an agreement of the parties to share losses.[4] In an analogous situation, the Texas Supreme Court determined that the expressed intention of the parties not to create a joint venture, coupled with the absence of a provision for the sharing of losses, precluded a finding that the parties were joint venturers. Coastal Plains Dev. Corp. v. Micrea, Inc., 572 S.W.2d 285, 288 (Tex. 1978). The court reaches the same conclusion today with respect

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> the execution of this Profits Assignment and in no event shall Assignee be liable for any contributions to Assignor. Assignee's only interest in Assignor shall be Assignee's right to receive the interests granted to Assignee and assigned under this Profits Assignment.

Ps. Sec. MSJ Ex. D.

[4] The court rejects defendants' assertion that the agreement to share losses is supplied by the provisions in the notes and guaranties limiting defendants' liability to 50% of the amounts outstanding. The 50% cap represents a bargained for limitation on losses to defendants, not an agreement that Old Vernon would share in any losses.

to the existence of a partnership. In considering the express disclaimer of any intent to form a partnership, the absence of any agreement to share losses, and the provisions of the lending documents themselves, a reasonable jury could not conclude a partnership existed between Old Vernon and SHWC. The court therefore grants the FDIC's motion to reconsider.[5]

B

The court next considers the FDIC's second motion for summary judgment.

In its prior ruling, the court determined that the FSLIC had established, by competent summary judgment evidence, its right to recover on the notes and guaranties. Defendants now challenge that conclusion, contending the profits assignment itself contained a value which should have been credited as a payment toward the loan, and further arguing that the foreclosure on the secured property discharged the guarantors' obligations. The court disagrees.

The parties agreed in the profits assignment that the assignment was being granted "as partial consideration for [Old Vernon's] agreement to make the Loan and the Second Loan." The parties further agreed that all profits to be assigned had been earned by Old Vernon by virtue of its lending commitments to SHWC. The parties declined to place a value on the profits assignment, recognizing that such value was "speculative" and may not exist at all.

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[5] Given the court's disposition of the motion to reconsider, the court need not decide the applicability of the D'Oench, Duhme or holder in due course doctrines to defendants' partnership allegations.

The terms of the profits assignment make clear that Old Vernon was assigned the profits as consideration for services already provided, i.e., its lending commitments. The potential profits available pursuant to the assignment were clearly not intended to constitute payments on the notes. The notes themselves contain no such provision, and the court declines to supply one by judicial fiat. The profits assignment constituted additional consideration for the making of the loans, consideration that was speculative at the time and ultimately proved to be of no value. Defendants are not entitled to reduce the amounts they owe by assigning a value to the profits assignment.

The court similarly rejects the individual defendants' assertion that the amount received at the foreclosure sale absolved defendants of liability. Defendants derive this novel assertion by reference to the following provision in the guaranties:

> Notwithstanding anything in the note to the contrary, guarantor shall have no personal or corporate liability for the payment of principal, interest or other amounts related to the note which exceeds in the aggregate, one-half the total of all such amounts which are outstanding from time to time.

According to defendants, the court placed undue emphasis on the phrase "from time to time" in its earlier ruling, and thereby interpreted the provision so that defendants could conceivably be held liable for the entire amount of the debt. Defendants contend the proper construction is to determine the amount due when demand for performance was made, and then hold defendants liable for one-half that amount. Defendants aver a contrary construction

leads to the "preposterous consequence of the Court's previous construction of the guaranty."

The court has little difficulty rejecting defendants' arguments. Under the terms of the guaranties, defendants waived demand. Thus the time of demand cannot serve as the relevant temporal base. More importantly, the individual defendants expressly guarantied payment of "one-half the total of all such amounts which are outstanding ...." In its January 1, 1989 summary judgment motion, the FSLIC attached the affidavit of Steven M. Shockett ("Shockett"),[6] a special representative of the FSLIC as receiver for New Vernon, which affidavit established that a post-foreclosure deficiency of $2,292,976.56 remained on Note 1 as of May 4, 1987. Shockett's affidavit also established that, because the price received at foreclosure was substantially less than the amounts owing on Note 1, the foreclosure sale produced no credit for the amounts owed on Note 2. Thus, as of May 4, 1987, defendants remained liable for unpaid principal on Note 2 in the amount of $1,256,914.84 plus accrued interest in the amount of $241,801.84. These amounts clearly were, and are, "outstanding." Thus, under the express terms of the notes and guaranties, defendants remain liable for one-half these amounts plus prejudgment and post-judgment interest, attorney's fees, and costs of court.

Having disposed of various contentions, the court now reaffirms its earlier conclusion that the FDIC has established its right to recover. The summary judgment records establish that SHWC executed the notes, the notes are in default, the FDIC is the present holder of the notes, and the notes have been introduced in

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[6] To the extent defendants contend the Shockett affidavit is not competent summary judgment evidence, the court rejects the contention. Shockett is clearly testifying from personal knowledge and is competent to do so.

evidence. This is sufficient to establish the FDIC's right to recover from SHWC. FSLIC v. Atkinson-Smith University Park Joint Venture, 729 F.Supp. 1130, 1132 (N.D. Tex. 1989). The record also shows that Claycomb, Heister, Swanson, and Wilson each guarantied payment of one-half of the sums due on both notes. This proof is sufficient to establish the FDIC's right to recover from the guarantors. B. L. Nelson & Assoc., Inc. v. Sunbelt Sav., F.S.B., ___ F.Supp. ___ (N.D. Tex. 1990) (No. CA3-88-2323-D) (Mar. 22, 1990) slip op. at 7 (citing Universal Metals & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 877-78 (Tex. 1976)). Because the FDIC has carried its burden of identifying the materials it contends demonstrate the absence of a genuine issue of material fact, see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), the burden now shifts to defendants to show summary judgment should not be granted. Atkinson-Smith, 729 F.Supp. at 1131.

Excluding the contentions previously rejected by the court, the only possible basis for avoiding summary judgment rests in defendants' various defenses and counterclaim. Construing defendants' first amended answer and counterclaim liberally, the court discerns defenses and claims based upon: (1) partnership; (2) usury; and (3) an alleged oral agreement whereby Old Vernon agreed to advance defendants sums greater than those specified in the notes. The first contention has been disposed of by the court supra, and the third contention is clearly barred by D'Oench, Duhme. See, e.g., Royal Bank of Canada v. FDIC, ___ F.Supp. ___ (N.D. Tex. 1990) (No. CA4-84-0161-D) (N.D. Tex. Mar. 22, 1990), slip op. at 11 (borrower who failed to ensure alleged representations were reduced to writing estopped from asserting representations against FDIC). Thus the court turns to the usury claim.

In considering this claim, the court need look no further than the recent decision in Woodcrest Assoc., Ltd. v. Commonwealth Mortgage Corp., 775 S.W.2d 434 (Tex. App. 1989, writ denied). In Woodcrest the court recognized the general validity of usury savings clauses and their repeated application to defeat claimed violations of usury laws. Id. at 437 (citations omitted). The court construed the savings clause at issue, and held that the provision "eliminat[ed] the contention that illegal interest was claimed." Id. at 439. Here, the interest rate specified in the notes is non-usurious. The notes contain savings clauses almost identical to the savings clause at issue in Woodcrest. The lawful rate specified in the notes, considered with the savings clause, make clear that the parties' intent was to avoid the charge of any usurious interest. The usury claim therefore fails. See id.

III

The FDIC's motion to reconsider and for summary judgment are granted. The FDIC shall submit a proposed form of judgment no later than 15 days from the filing of today's decision. If defendants desire to challenge the reasonableness of the FDIC's claimed attorney's fees, they shall submit an affidavit in opposition no later than 15 days from the filing of today's decision.

SO ORDERED.

April 18, 1990.

s/Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, As Manager of the FSLIC RESOLUTION FUND, As Receiver for VERNON SAVINGS AND LOAN ASSOCIATION, FSA,	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION NO. CA3-87-2955-D
L. L. CLAYCOMB, J. W. HEISTER, E. L. SWANSON, D. M. WILSON, and SHWC, INC.,	§	
Defendants.	§	

JUDGMENT

For the reasons stated in the Court's Memorandum Opinion and Order filed April 18, 1990, it is

ORDERED and ADJUDGED that Plaintiff, the Federal Deposit Insurance Corporation, as Receiver for Vernon Savings and Loan Association, FSA recover from Defendants, L. L. Claycomb, J. W. Heister, E. L. Swanson, D. M. Wilson, and SHWC, Inc., jointly and severally, $2,359,891.28, accrued interest from and including May 1, 1990 until the date of judgment at a per diem rate of $639.18, attorneys' fees and costs in the amount of $39,369.05, and post-judgment interest on these sums at the legal rate of 8.70% per annum.

Done at Dallas, Texas this 29th day of May, 1990.

s/Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action
No. CA3-87-2955-D

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, AS RECEIVER FOR VERNON SAVINGS AND LOAN ASSOCIATION, FSA, Plaintiff

v.

L. L. CLAYCOMB, J. W. HIESTER, E. L. SWANSON, D. M. WILSON, and SHWC, INC., Defendants

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August 1, 1990

Order

On April 18, 1990 the court granted summary judgment in favor of the Federal Deposit Insurance Corporation ("FDIC") and against defendants L.L. Claycomb, J.W. Hiester, E.L. Swanson, D.M. Wilson, and SHWC, Inc. ("SHWC"), thus establishing the FDIC's entitlement to recover on two promissory notes executed by SHWC and guarantied by the individual defendants. The court entered judgment on May 29, 1990.

On June 11, 1990 defendants filed their motion for a "new trial," contending the court erred in its conclusion that no joint venture or partnership relationship existed between defendants and Vernon Savings & Loan Association ("Old Vernon") and further contending the FDIC committed usury when it submitted a proposed form of judgment to the court that contained certain errors. The court rejects each of defendants' contentions. The summary judgment record made clear that the relationship between Old Vernon and defendants was that of lender/borrower. Defendants cannot avoid their obligations by seeking to change the nature of the relationship. Defendants can similarly find no solace by relying on an inadvertent error in a proposed form of judgment never entered by the court. The proposed judgment was neither a demand nor a charge for excessive interest.

Treating the motion for new trial as a Fed. R. Civ. P. 59(e) motion, the motion is denied.

SO ORDERED.

August 1, 1990.

s/Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1709

FEDERAL DEPOSIT INSURANCE CORPORATION
as Manager of the FSLIC Resolution
Fund, and as Receiver for Vernon
Savings and Loan Association, FSA,
Plaintiff-Appellee

VS.

L.L. CLAYCOMB, Defendant,

SHWC, INC., J. W. HEISTER, D. M. WILSON,
and E. L. Swanson,
Defendants-Appellants

Oct. 23, 1991

Before KING and DUHÉ, Circuit Judges, and SCHWARTZ, DISTRICT JUDGE.[1]

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[1] Senior District Judge of the Eastern District of Louisiana, sitting by designation.

CHARLES SCHWARTZ, Jr., District Judge:

Defendants, SHWC, Inc., D. M. Wilson and E. L. Swanson [hereinafter referred to collectively as "SHWC"] appeal from a $2,359,891.28 judgment[2] against them, jointly and severally, in favor of the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Vernon Savings and Loan Association, FSA. SHWC argues on appeal that there exists material issues of fact concerning defendants' claim of usury and whether the loan documents at issue demonstrated the elements of partnership or joint venture under Texas law. SHWC further claims the district court erred in the calculation of the deficiency awarded to the FDIC. Finally, SHWC contends notwithstanding FIRREA amendments, that the district court did not have jurisdiction and should have dismissed or remanded the case.

We disagree with appellants SHWC's assignments of error and hold that the district court correctly applied Texas law and its grant of summary judgment was proper. Accordingly, the Court affirms.

I. Factual Background and Prior Proceedings.

On April 18, 1984, SHWC executed Deed of Trust Notes payable to Vernon Savings and Loan Association ("Old Vernon"): (1) the First Note was in the principal amount of $10 million; and (2) the Second Note was in the principal amount of $1.25 million.[3] Each of the Notes provided the following limitation of liability:

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[2] The May 29th, 1991 judgment of the district court further adjudges accrued interest due from and including May 1, 1990 until the date of judgment with a per diem rate of $639.18, attorneys' fees and costs in the amount of $39,369.05, and post-judgment interest on said sums at the legal rate of 8.70% per annum.

[3] The loan proceeds were used to purchase an existing apartment complex in Dallas, Texas, which was to be revamped into retirement condominiums. SHWC planned to market the project as Meadowstone Condominiums.

> *Limitation of Liability.* Notwithstanding anything in this Note to the contrary, Maker shall have no personal or corporate liability for the payment of principal, interest or other amounts related to this Note which exceeds, in the aggregate, one-half the total of all such amounts which are outstanding from time to time.

The individual defendants guaranteed payment under both Notes to Old Vernon, likewise limiting their liability to one-half the total amount outstanding. Each Note was secured by a separate deed of trust on certain Dallas property. Neither the Notes, nor the unconditional guarantees contained any express language reflecting an agreement between SHWC and Old Vernon either to share in the losses on the project or that Old Vernon assume any liability on account of SHWC. Moreover, such sharing of losses and borrower's liability was expressly disavowed.

As part of the loan transaction, SHWC granted to Old Vernon a 50% profits interest in the Dallas property. The Profits Assignment provides at § 4.03:

> *No Member or Partner.* By its acceptance of this Profits Assignment, Assignee does not become a member or a partner of or with Assignor. Consequently, in no event shall Assignee be liable for any of the debts, obligations or liabilities of Assignor or of its partners as a result of the execution of this Profits Assignment and in no event shall Assignee be liable for any contributions to Assignor.

> Assignee's only interest in Assignor shall be Assignee's right to receive interests granted to Assignee and assigned under this Profit Agreement. [emphasis supplied].

Essentially, the foregoing provision expressly disavows the existence of any partnership between the parties thereto, as well as any sharing of losses or liability of SHWC or its partners.

Section 4.15 of the Loan Agreement itself states in pertinent part:

> *4.15 No Liability of Lender.* Lender shall have no liability, obligation, or responsibility whatsoever with respect to the construction of Improvements except to advance the Loan and the Borrower's Deposit pursuant to this Loan Agreement . . . .

The unambiguous import of the foregoing language contained in the Loan Agreement is that Old Vernon undertook no obligation, liability or responsibility, whatsoever, with respect to the Dallas property which SHWC borrowed funds to develop. The corollary, that Old Vernon solely undertook the obligation to loan funds to SHWC, is further patent.

The language of the guaranty agreement further evidences the debtor-creditor relationship as between SHWC and Old Vernon, to wit:

> Guarantor unconditionally and irrevocably and absolutely, jointly and severally, guarantees to 'Lender' payment, among other

> things, of the sums advanced under the Loan Agreement.

Unquestionably, the guarantors were, from the outset, personally liable for 50% of the loan.

The terms of both Notes provided that principal and accrued interest was due and payable on April 18, 1986. SHWC defaulted on the payment of both Notes. On December 7, 1986, original plaintiff Vernon Savings and Loan Association ("Old Vernon")[4] filed suit in Texas state court against defendants L. L. Claycomb[5], J. W. Heister, D. M. Wilson, L. E. Swanson ("guarantors"), and SHWC, Inc. ("SHWC"), on two deed of trust notes from SHWC to Old Vernon. The four individual defendants guaranteed the notes. During the pendency of the state court proceedings Old Vernon was declared insolvent and the Receiver FSLIC transferred its assets to Vernon Savings and Loan Association, FSA ("Vernon, FSA"), a federally chartered savings and loan.

On April 14, 1987, pursuant to instructions from Vernon, FSA, then duly appointed substitute trustee under the First Lien Deed of Trust posted the Dallas property for a trustee's sale. On May 5, 1987, the Substitute Trustee Sale of the Dallas Property was conducted. The proceeds from that sale were $8,200,000.00.

On December 16, 1987, FSLIC appointed by the Federal Home Loan Bank Board substituted as receiver of Vernon, FSA and removed the case to United States District Court for the Northern District of Texas. By virtue of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the FSLIC was abolished and all of the assets of the FSLIC as Receiver for Vernon, FSA were transferred to FDIC. On October 30, 1989, FDIC was substituted as party plaintiff.

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[4] A state-chartered savings and loan association.

[5] Claycomb is not a party to this appeal and did not appeal the judgment.

On January 3, 1989, FDIC filed its Motion for Summary Judgment along with supporting documents and briefs. SHWC raised affirmative defenses, counterclaims, and claims of offset, to wit: failure of consideration, usury, breach of contract, fraud, misrepresentation and promissory estoppel. On June 29, 1989, the district court denied the FDIC's Motion for Summary Judgment.[6]

On January 30, 1990, the FDIC moved for reconsideration of the district court's prior ruling, and filed its Second Motion for Summary Judgment, asserting that the *D'Oench, Duhme* and federal holder-in-due-course ["HIDC"] doctrines precluded partnership/joint venture and usury findings, and/or alternatively, that state law barred those defenses. On April 18, 1990, the district court by Memorandum Opinion and Order granted FDIC's Second Motion for Summary Judgment, holding SHWC's defenses barred as a matter of state law. Judgment was entered on May 29, 1990 against SHWC and the individual guarantors.[7]

The district court reaffirmed its earlier ruling that the FDIC established its right to recover, under the express terms of the loan documents. Having disposed of the defense of partnership

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[6] In Memorandum Opinion and Order entered June 29, 1989, notwithstanding and noting disagreement with "much of the defendants' opposition", Judge Fitzwater denied summary judgment for the stated reason that at that time he was unable to determine the legal relationship of the parties based on the profits assignment. The district court was unable to determine whether the profits assignment was or was not a part of the bank's records, and concomitantly, whether the partnership defense was barred pursuant to the *D'Oench-Duhme* doctrine as an undisclosed/secret agreement. However, the district court concluded therein that mover had established its right to judgment equal to one-half of the $3,549,871.30, plus interest, attorney's fees and costs.

[7] On June 11, 1990, appellants filed a Motion for New Trial which was denied by the district court's order entered August 1, 1990.

on the basis of Texas law,[8] the district court addressed the defense of usury under state law.

Relying on *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 439 (Tex. App. 1989), *writs denied*, the district court held that the usury savings clause at issue in the present case eliminated the claim of usury, noting that the Texas Supreme Court in *Woodcrest* construed a savings clause essentially identical to that in the case at bar and so held.

It is from this summary judgment that defendants SHWC, Swanson, Wilson and Heister appeal. FDIC has cross-appealed and contends that it is unnecessary to examine the state law issues because SHWC's defenses and claims are barred by the federal common law *D'Oench, Duhme* doctrine and by 12 U.S.C. §

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[8] In its Memorandum Opinion and Order dated April 18, 1990, the district court stated:

> The unmistakable intent of the parties to the transactions at issue was to create a relationship whereby Old Vernon would provide loans to SHWC and SHWC would agree to repay those loans with interest. Additionally, as consideration for the making of the loan, SHWC agreed to pay Old Vernon a portion of the profits generated by the property developed with the borrowings. The loan documents at issue do not refer to or evidence in any way the existence of a partnership. Nor do the documents contain any reference to an agreement of the parties to share losses. In an analogous situation, the Texas Supreme Court determined the expressed intention of the parties not to crate a joint venture coupled with the absence of a provision; for the sharing of losses precluded a finding that the parties were joint venturers. The court reaches the same conclusion with respect to the existence of a partnership.

1823(e), and suggests in the alternative affirmance of the district court's decision on the basis of Texas law.

II. Discussion.

A. *Jurisdiction*

[1] At the outset some discussion of the jurisdictional issue raised on appeal appears to be in order. SHWC has raised the question of the authority of the FDIC to act in its capacity as receiver in this particular proceeding. The gravamen of SHWC's argument is that there exists no express provision in FIRREA which allows the FDIC to succeed the FSLIC as receiver for institutions placed into receivership prior to January 1, 1989.

The FSLIC was abolished pursuant to FIRREA's revamping the savings and loan regulatory structure.[9] In *Carrollton-Farmers Branch v. Johnson & Cravens*, 889 F.2d 571, 572-73 (5th Cir. 1989), the court explained that new section 407 of FIRREA expands federal jurisdiction to all suits to which the FDIC is a party, with one exception, the instance where FDIC was appointed, as receiver, exclusively by state authorities.[10] Here, as in *Carrollton-Farmers*, supra, the FSLIC was appointed, as receiver, by the Federal Home Loan Bank Board, federal authority. Hence, the exception, which is codified at 12 U.S.C. § 1819(b)(2)(D)(i), does not apply to this case, and section

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[9] FIRREA, § 401(a), 103 Stat. 354, codified at 12 U.S.C. § 1437.

[10] See also, *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205, 206-207 (5th Cir. 1989); and *Sunbelt Savings, FSA v. Bent Trail Phase IV Joint Venture*, 907 F.2d 1569, 1571 (5th Cir. 1990) [held the relevant jurisdictional provision of FIRREA applicable to previously pending cases].

1819(b)(2)(A) confers original jurisdiction, while section 1819(b)(2)(B) provides removal jurisdiction.[11]

Moreover, section 401(h) of FIRREA specifically provides that the resolutions creating the receivership for which the FSLIC was receiver remain in effect.[12] Section 401(i) directs the

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[11] Section 407 of FIRREA repeals § 1730(k)(1) and Section 209 of FIRREA amends 12 U.S.C. § 1819, now the relevant jurisdictional provision, which as amended provides:

> (2) Federal Court Jurisdiction.
>
> (A) In General.-Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.
>
> (B) Removal.-Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit or proceeding from a State court to the appropriate United States district court.

Under subparagraph (D) of this provision, the federal courts lack jurisdiction only in those cases in which the Corporation was appointed as receiver exclusively by State authorities. In the case on appeal, as previously mentioned the FHLBB, a federal entity, appointed FSLIC as receiver. See e.g., *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205, 207 (5th Cir. 1989).

[12] Section 401 of FIRREA provides: "[A]ll orders, resolutions, determinations, and regulations, which-(1) have been issued, made, prescribed, or allowed to become effective by the [FSLIC] or the [FHLBB] (including orders, resolutions, determinations, and regulations which relate to the conduct of conservatorship and receiverships), or by a court of competent jurisdiction, in the performance of functions transferred by this Act [Pub.L. 101-73];and (2) are in effect on the date this Act takes effect [Aug. 9, 1989], shall continue in effect according to the terms of such orders, resolutions, determinations, and regulations and shall be enforceable against the [DOTS], the [FDIC], the [FHFB], or the [RTC], as the case may be, until modified, terminated, set aside, or superseded

Chairperson of the FDIC, *inter alia*, to identify all orders relating to the conduct of conservatorship and receiverships "in accordance with the allocation of authority between them under [FIRREA] and amendments made by [FIRREA] ...." The FDIC is specifically names as one of the entities with authority to enforce orders pertaining to pre-FIRREA receiverships.

We agree with appellee's argument to the effect that these provisions clearly express the intent on the part of Congress to grant FDIC authority to succeed to the FSLIC with respect to receiverships appointed prior to January 1, 1989. Finally, section 401(f)(2) evidences the intent of Congress that pre-FIRREA receiverships not be abolished and provides in pertinent part that the abolition of the FSLIC does not abate lawsuits filed by or against the FSLIC, "except that the appropriate successor to the interests of the [FSLIC] shall be substituted ... as a party to any such action or proceeding."

The result urged by SHWC runs directly contrary to the language in Section 401(f)(2). Borrowing language from the court's decision in *FDIC v. Gillard*, 740 F.Supp. 427, 428 (N.D. Tex. 1990), "under [appellants'] theory, there would be no successor to the FSLIC for institutions placed in receivership prior to the enactment of FIRREA. The court finds no indication in the statute that Congress intended to abolish all pre-FIRREA receiverships. Congress' intent was apparently otherwise."

On the record before this Court, and in light of FIRREA, we see nothing to divest the district court of jurisdiction.

B. *Partnership/Joint Venture Under Texas State Law.*

[2] Under Texas law, a partnerships an association of two or more persons to carry on as co-owners of a business for

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in accordance with applicable law by the [DOTS], the [FDIC], the [FHFB], or the [RTC], as the case may be, by any competent court of jurisdiction, or by operation of law."

profit.[13] The essential elements of either a joint venture or a partnership agreement, whether implied or express, are: (1) a community of interest in the venture/partnership; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise.[14] Where any one of these elements is absent, no joint venture or partnership exists.[15]

[3] The profits assignment in the case at bar expressly disavows any intent on the part of the maker to become a partner with SHWC. The district court rejected SHWC's assertion that the 50% limitation of liability cap evidences an agreement to share in the losses.

The absence of an express provision obligating the parties to share in the losses indicates that a partnership was not intended.[16] As previously mentioned, there are several provisions which specifically disclaim the existence of any partnership agreement. In addition to the disclaimer in the Profits Assignment, Section 4.15 of the Loan Agreement states in pertinent part:

> 4.15 *No Liability of Lender.* Lender shall have no liability, obligation, or responsibility whatsoever with respect to the

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[13] Tex.Rev.Civ.Stat.Ann. art. 6132b § 6(1) (Vernon 1970).

[14] See, e.g., *United States v. $47,875.00 in U.S. Currency*, 746 F.2d 291, 294 (5th Cir. 1984); *Ayco Development Corp. v. G.E.T. Service Co.*, 616 S.W.2d 184, 186 (Tex. 1981); *Coastal Plains Development Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978); and *Carlyle Joint Venture v. H. B. Zachry Co.*, 802 S.W.2d 814, 816 n. 2 (Tex.App.1990) [stating that joint venture and partnership are so similar in nature that they are substantially governed by the same rules].

[15] *United States v. $47,875.00 in U.S. Currency*, 746 F.2d at 294.

[16] *Gutierrez v. Yancey*, 650 S.W.2d 169, 172 (Tex.App. 1983).

> construction of the Improvements except the Loan and the Borrower's Deposit pursuant to this Loan Agreement....

Unquestionably, the parties intent was that Old Vernon undertook no obligation, liability or responsibility with respect to the Dallas property, which SHWC borrowed money to develop, other than to loan money to SHWC.

The Texas Supreme Court case cited in the district court's opinion, *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978), sets forth the controlling law. In this analogous case, the Texas Supreme Court determined that the expressed intent of the parties not to create a joint venture, coupled with the absence of a provision for the sharing of losses, precluded a finding that the parties were joint venturers. Certainly, if an express provision disavowing any joint venture coupled with no express provision for the sharing of losses precludes a finding of joint venture under Texas law, then an express provision disavowing the existence of a partnership coupled an express provision disavowing the sharing of losses and liability precludes a finding of either partnership or joint venture, as a matter of law.

[4] SHWC further suggests that its claim of "fiduciary duty"[17] arises by operation of Texas law from the alleged

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[17] In *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983), the Texas Supreme Court rejected the contention that an implied duty of good faith and fair dealing exists in every contract. Such duty must rather be expressly provided or it may be recognized where a "special relationship" is found to exist between the parties. *Id.* at 524-25 n. 4. It is further well-settled under Texas law that the borrower-lender relationship does not give rise to such a duty nor will mere subjective trust alone create a fiduciary relationship. *See, e.g., Lovell v. Western National Life Insurance*, 754 S.W.2d 298, 302-03 (Tex. App. 1988, *writ denied*) [mortgagor-mortgagee relationship does not create a "special relationship"]; *Consolidate Bearing & Supply Co. v. First National Bank*, 720 S.W.2d 647, 650 (Tex. App.1986, *no writ*); and *Thomson v. Norton*, 604 S.W.2d 473, 475-476 (Tex. App.1980, *no writ*) [held that the fact that bank officer both found and

"partnership agreement." As previously explained the essential predicate of partnership cannot be inferred from the loan documents before the court, therefore any fiduciary duty arising therefrom is not within the realm of possibility under Texas law. The borrower-lender relationship, with which we are here concerned, does not give rise to a "fiduciary" or "special relationship."

[5] The loan documents at issue expressly disclaim partnership, sharing of losses and liability of SHWC on the part of Old Vernon. SHWC's argument to the effect that the 50% cap on borrower's liability is tantamount to an agreement to share losses is specious in light of express provision to the contrary in the profit assignment. This Court further agrees with the reasoning of the district court that, "the 50% cap represents a bargained for limitation of losses to [SHWC], not an agreement that Old Vernon would share in any losses."[18]

Thus, under well-settled Texas law there was no joint venture or partnership in existence between Old Vernon and SHWC. Having failed to establish one of the essential elements of joint venture/partnership as a matter of law, SHWC cannot establish any recognizable legal defense in regard to partnership or joint venture.[19]

For all of the foregoing reasons, we conclude the district court properly determined, as a matter of law, SHWC has no

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showed the land to plaintiff which could be purchased for purposes of tax breaks did not raise the issue of confidential relationship].

[18] "FDIC vs. L. L. Claycomb, et al" CA No. 3-87-2955-D, Memorandum Opinion and Order entered April 18, 1990, at p. 5 n. 4.

[19] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed2d 265 (1986).

defense based on either joint venture, partnership or fiduciary duty arising therefrom against the FDIC.

C. *Usury under Texas Law.*

[6-8] In general, Texas courts recognize the validity of usury savings clauses and enforce those clauses to defeat claims of usury.[20] To determine the effect of a usury savings clause, the court must consider the terms of the savings clause as a whole in light of the circumstances surrounding the transaction.[21] The court is further required to give effect to the objective intention of the parties, as reflected by the written documents associated with the transaction and *must presume the parties intended to obey the law* unless a contrary intention clearly manifests itself.[22] The court must, if reasonably possible, give effect to the savings clause and interpret the savings clause so as to deny the right to usurious interest.[23]

[9] The district court correctly held the usury savings clauses set forth in the loan documents defeat any usury defense under Texas law. In *Woodcrest*, supra, the court construed a usury

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[20] *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046, 1050 (Tex.1937); *Woodcrest Assoc. Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437 (Tex. App. 1989, *writ denied*), *Conte v. Greater Houston Bank*, 641 S.W.2d 411, 418 (Tex. App. 1982, *writ ref'd n.r.e.*) [stating if a contract as a whole is susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality]. *See also, In re Casbeer*, 793 F.2d 1436, 1447 (5th Cir. 1986); *Mack v. Newton*, 737 F.2d 1343, 1371 (5th Cir. 1984); *reh'g denied, en banc*, 750 F.2d 69 (5th Cir. 1984); *Imperial Corp. v. Frenchman's Creek Corp.*, 453 F.2d 1338, 1344-45 (5th Cir. 1972).

[21] *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 438 (Tex. App. 1989), *writ denied* (Jan. 24, 1990) and *reh'g of writ of error overruled* (Feb. 28, 1990).

[22] *Id.*

[23] *Id.*

savings clause similar to those at issue in the present case[24] and held that provision eradicated any usurious interest claim, stating as follows:

> Interpreting the demand letters as a whole in light of the underlying loan documents, we construe Commonwealth's demand as being

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[24] The pertinent provision here contained in paragraph 9 of both Notes reads as follows:

> 9. *Controlling Agreement*: All agreements between Maker and Holder, whether now existing or hereafter arising and whether written or oral, are hereby limited so that in no contingency, whether by reason of demand or acceleration of the maturity hereof or otherwise, shall the interest contracted for, charged, received, paid or agreed to be paid to Holder exceed interest computed at the Maximum Rate. If, from any circumstance whatsoever, interest would otherwise be payable to Holder in excess of interest computed at the Maximum Rate, the interest payable to Holder shall be reduced to interest computed at the Maximum Rate; and if from any circumstance Holder shall ever receive anything of value deemed interest by applicable law in excess of interest computed at the Maximum Rate, an amount equal to any excessive interest shall be applied to the reduction of the principal hereof and not to the payment of interest, or if such excessive interest exceeds the unpaid balance of the principal hereof, such excess shall be refunded to the Maker. All interest paid or agreed to be paid to the Holder shall, to the extent permitted by applicable law, be amortized, prorated, allocated, and spread throughout the full period of payment in full of the principal (including the period of any renewal or extension hereof) so that the interest hereon for such full period shall not exceed interest computed at the Maximum Rate. This paragraph shall control all agreements between Maker and Holder.

Similar language is contained in the Loan Agreement at paragraphs 2.07 and 6.06, the First Lien Deed of Trust at paragraph 3.10, the Profits Assignment at paragraph 3.07, and the Second Lien Deed of Trust at paragraph 13.10.

> automatically constricted within the bounds of the law by virtue of the savings clauses in the underlying documents thereby eliminating any contention that illegal interest was claimed.[25]

The only pertinent intention here evident in all of the loan documents before this Court is that of the parties to avoid a usurious transaction. That intention is presumed to exist absent clear and contrary evidence.[26] SHWC does not contend that the note is facially usurious or that the transaction is usurious even if the savings clause is applied. Here, as in *Woodcrest*, supra, the loan documents manifest the intent "to structure the entire transaction so as to avoid . . . usurious interest."[27]

Moreover, under the rationale of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981),[28] and inasmuch as the FDIC was created to serve the public interest, the usury claim which is punitive in nature under Texas law,[29] cannot be asserted against the FDIC as such application could have no deterrent effect, and would only serve to punish innocent creditors of the failed institution by diminishing available assets.

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[25] 775 S.W.2d at 439.

[26] *Nevels*, 102 S.W.2d at 1049-50.

[27] 775 S.W.2d at 439.

[28] In *City of Newport*, supra, a claim for punitive damages was asserted against a municipality under Title 42, United States Code, § 823.

[29] *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988) [Texas usury statute is penal in nature]; and *Martinez v. Corpus Christi Area Teacher Credit Union*, 758 S.W.2d 946, 949 (Tex. App. 1988, *cert. denied*) [to the same effect].

This rule that a claim for punitive damages cannot be asserted against institutions created to serve the public interest has been applied to receivers for insolvent banks.[30]

For all of the foregoing reasons, we conclude the district court properly determined, as a matter of law, SHWC has no claim of usury against the FDIC.[31]

D. *Calculation of the Award to FDIC.*

[10] SHWC contends in that the district court erred in calculating the award, arguing that the temporal base for calculation of any deficiency is date of demand. Its argument ignores both the facts that each of the guarantors waived demand and that under the terms of the guaranties each remain liable for "one-half the total of all such amounts which are outstanding from time to time." Moreover, Paragraph 14 of both Notes have the same limitation to the effect that the Maker shall have no liability

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[30] *See, e.g., FSLIC v. T. F. Stone-Liberty Land Associates*, 787 S.W.2d 475, 492 (Tex. App. 1990) [agreeing with the FSLIC's arguments and recognizing other courts, which have drawn on the policy reasons articulated in *D'Oench* to fashion a federal common law rule granting a receiver immunity from usury and punitive damages]; *Professional Asset Management, Inc. v. Penn Square Bank, N.A.*, 566 F.Supp. 134, 136 (W.D. Okla. 1983) [held the FDIC appointed receiver for the failed bank was not liable for punitive damages]. See also, *Hershey v. Anderson*, 127 F.2d 884 (6th Cir. 1942) [holding a penal statute should not be construed to bring about the anomalous result that penalties will not be paid by the individuals against whom it is directed, but rather, paid by the persons whose benefit the receivership was imposed]; and *FDIC v. Aroneck*, 509 F.Supp. 553, 557 (D.S.C. 1979), *aff'd in pertinent part* and *vacated in part*, 643 F.2d 164 (4th Cir. 1981) [citing *Hershey*, supra, and holding that usury cannot be asserted against the FDIC].

[31] This Court's foregoing affirmance of the district court's decision o the basis of Texas law, renders any consideration of the *D'Oench* doctrine and its bar against consideration of unrecorded agreements unnecessary.

thereunder exceeding 50% of the total of all such amounts outstanding from time to time.[32]

By affidavit of Steven M. Shockett, the FDIC established that a post foreclosure deficiency of $2,292,976.56 remained on Note 1 [i.e. the $10 million Note] as of May 4, 1987 and no amounts were credited to amounts owed on Note 2 [i.e. the $1.25 million Note], because the price received at the foreclosure was substantially less than the amounts owing on Note 1. The district court accurately determined based on the Shockett's affidavit and the documents attached thereto, that as of May 4, 1987, SHWC and the individual guarantors remained liable for one-half the remaining indebtedness on Note 1 [$2,292,976.56] and one-half of the unpaid principal on Note 2 [$1,256,914.84], plus accrued interest in the amount of $241,801.84, amounts which were and as the trialcourt set forth still are outstanding.

III. CONCLUSION

For all of the above and foregoing reasons, the judgment of the district court is AFFIRMED.

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[32] As the district court aptly instructs in its Memorandum Opinion and Order entered June 29, 1989, "these provisions limit liability to one-half of the indebtedness outstanding under each note for as long as *any* indebtedness is outstanding." In other words, that the foreclosure purchase price of collateral exceeded one-half of the amount owing on the notes does not eradicate the debt, but rather reduces guarantor's obligation to one-half the remaining indebtedness.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-1709

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Manager of the FSLIC Resolution Fund
as Receiver for Vernon Savings and Loan
Association, FSA, Plaintiff-Appellee,

versus

L. L. CLAYCOMB, Defendant,

J. W. HEISTER, E. L. SWANSON,
D. M. WILSON, and SHWC, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(December 6, 1991)

Before KING and DUHÉ, Circuit Judges, and SCHWARTZ*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULE 41 FOR STAY OF
THE MANDATE.

ENTERED FOR THE COURT:

S/Carolyn Dineen King
United States Circuit Judge

*Senior District Judge of the Eastern District of Louisiana, sitting by designation.

FILED
MAY 12 1992
OFFICE OF THE CLERK

No. 91-1441

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHWC, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Federal Deposit Insurance Corporation properly succeeded the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for a failed thrift institution following FSLIC's abolition.

2. Whether the court of appeals correctly determined that petitioners' affirmative defenses and counterclaims were barred under state law.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1441

SHWC, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-33a) is reported at 945 F.2d 853. The opinion of the district court (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1991. A petition for rehearing was denied on December 6, 1991. Pet. App. 34a-35a. The petition for a writ of certiorari was filed on March 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1984, petitioner SHWC, Inc. (SHWC) executed two notes payable to Vernon Savings and Loan Association (Old Vernon) for principal amounts of $10 million and $1.25 million. Each note was secured by a separate deed of trust on certain Dallas property, which SHWC was to develop with the borrowed funds. The notes were guaranteed by petitioners Swanson, Heister, and Wilson, and by L.L. Claycomb. Pet. App. 17a-19a.

As part of the loan transaction, SHWC granted to Old Vernon a 50% profits interest in the secured property. The "profits assignment" provided:

> *No Member or Partner.* By its acceptance of this Profits Assignment, Assignee [Old Vernon] does not become a member or a partner of or with Assignor [SHWC]. Consequently, in no event shall Assignee be liable for any of the debts, obligations or liabilities of Assignor or of its partners as a result of the execution of this Profits Assignment and in no event shall Assignee be liable for any contributions to Assignor. Assignee's only interest in Assignor shall be Assignee's right to receive interests granted to Assignee and assigned under this Profit Agreement.

Pet. App. 18a-19a. The loan agreement also contained a provision stating, in pertinent part:

> *No Liability of Lender.* Lender shall have no liability, obligation, or responsibility whatsoever with respect to the construction of Improvements except to advance the Loan and the Borrower's Deposit pursuant to this Loan Agreement.

Id. at 19a. Under the terms of both notes, principal and accrued interest were due and payable on April 18, 1986. *Id.* at 20a.

SHWC defaulted on the notes. On December 7, 1986, Old Vernon filed suit on the notes in Texas state court against SHWC and the guarantors. During the pendency of the state court proceedings, Old Vernon was declared insolvent by the Federal Home Loan Bank Board (Bank Board),[1] and the Federal Savings and Loan Insurance Corporation (FSLIC)[2] was appointed receiver. As receiver, FSLIC transferred Old Vernon's assets to Vernon Savings and Loan Association, FSA (Vernon FSA). Subsequently, the Bank Board declared Vernon FSA insolvent, and appointed FSLIC as receiver for Vernon FSA. On December 16, 1987, FSLIC was formally substituted for Vernon FSA in the state court proceedings and removed the case to federal court. Following the enactment of FIRREA and the abolition of FSLIC, the Federal Deposit Insurance Corporation (FDIC) was substituted as party plaintiff. Pet. App. 20a.

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[1] The Bank Board was a federal agency created pursuant to the Federal Home Loan Bank Act, ch. 522, § 17, 47 Stat. 736, formerly codified at 12 U.S.C. 1437 (1988) (repealed 1989). The Bank Board was charged with chartering and supervising savings and loan associations and directing the operations of the Federal Savings and Loan Insurance Corporation. The Bank Board was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401, 103 Stat. 354.

[2] The Federal Savings and Loan Insurance Corporation was a federal instrumentality created pursuant to the National Housing Act, ch. 847, § 402, 48 Stat. 1256, formerly codified at 12 U.S.C. 1725 (1988) (repealed 1989), to insure deposit accounts in savings and loan associations. The FSLIC, like the Bank Board, was abolished by FIRREA.

2. The FDIC filed a motion for summary judgment to recover on the notes and guarantees. SHWC raised affirmative defenses and counterclaims alleging failure of consideration, usury, fraud, and breach of contract. The defenses were based on SHWC's theory that a partnership existed between Old Vernon and SHWC. On June 29, 1989, the district court denied FDIC's motion because it was unable to determine the legal relationship between the parties based on the "profits assignment." Pet. App. 21a & n.6.

On January 30, 1990, the FDIC filed a second motion for summary judgment, asserting that SHWC's defenses were barred under Texas law, the protections afforded the FDIC under *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and the federal holder-in-due-course doctrine. Pet. App. 21a. The district court granted that motion, holding that, under Texas law, no partnership between SHWC and Old Vernon existed. The district court concluded that "[t]he unmistakable intent of the parties * * * was to create a relationship whereby Old Vernon would provide loans to SHWC and SHWC would agree to repay those loans with interest. * * * The loan documents at issue do not refer to or evidence in any way the existence of a partnership." *Id.* at 5a. The district court held that, under Texas law, an expressed intention of the parties not to create a partnership, coupled with the absence of a provision for the sharing of losses, precluded a finding that the parties were partners. *Id.* at 5a-6a.[3]

The district court also rejected SHWC's usury claim, holding that the loan documents contained a

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[3] Because of its state law holding, the district court did not consider whether the *D'Oench, Duhme* or federal holder-in-due-course doctrines barred SHWC's partnership claims.

usury savings clause that, under state law, defeated a usury claim. Because the notes specified a lawful interest rate, and the usury savings clause demonstrated a clear intent to avoid any illegal interest charges, the court concluded that the loans were not usurious. Pet. App. 10a.

3. The court of appeals affirmed. First, the court rejected SHWC's claim that the FDIC did not have authority to act as successor to FSLIC as receiver for the failed thrift. The court noted that Section 401 of FIRREA, Pub. L. No. 101-73, Tit. IV, 103 Stat. 354, which abolished FSLIC (see note 2, *supra*), provided that the resolutions creating FSLIC receiverships were to remain in effect, and that FDIC was authorized by the statute to enforce orders pertaining to pre-FIRREA receiverships. Pet. App. 25a. The court also held that Congress clearly intended to grant FDIC authority to succeed the FSLIC with respect to receiverships established prior to January 1, 1989. Finally, the court noted that FIRREA provides that no lawsuits involving the FSLIC are to abate as a result of FSLIC's abolition; FIRREA mandates that "the appropriate successor to the interests of the [FSLIC] shall be substituted." *Ibid.*

Turning to the merits, the court held that SHWC's partnership and usury claims were barred by Texas state law. Citing *Coastal Plains Dev. Corp.* v. *Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978), the court of appeals held that the "profits assignment" provision disavowing the existence of a partnership, coupled with the express provision disavowing the sharing of losses and liability, precluded a finding of partnership as a matter of law. Pet. App. 27a. The court of appeals also held that the "usury savings clauses" in the loan documents, which reflected the parties' intention to

abide by the usury laws, defeated SHWC's usury claims. *Id.* at 29a.[4]

ARGUMENT

1. Petitioners contend (Pet. 10-16) that in enacting FIRREA, Congress failed to provide authority for the FDIC to succeed to receiverships to which the FSLIC had been appointed prior to January 1, 1989. That contention is incorrect and, in any event, is of no continuing importance.

As the court of appeals explained, FIRREA specifically provides that "the resolutions creating the receivership[s] for which the FSLIC was receiver remain in effect" following the abolition of the FSLIC. Pet. App. 24a. In Section 401(i)(1) of FIRREA, Pub. L. No. 101-73, Tit. IV, 103 Stat. 357. Congress provided that following the enactment of FIRREA, the Director of the Office of Thrift Supervision and the Director of the FDIC shall "identify the regulations and orders which relate to the conduct of conservatorships and receiverships in accordance with the allocation of authority between them under this Act." In view of this provision, and others indicating that FIRREA did not intend to create a "gap" in the continuation of receiverships, the court of appeals was correct in stating that FIRREA's transitional provisions "clearly express the intent on the part of Congress to grant FDIC authority to succeed to the FSLIC with respect to

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[4] The court of appeals also relied on *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), in finding that SHWC's usury claim should be rejected because it was punitive in nature, would have no deterrent effect as applied to the FDIC, and "would only serve to punish innocent creditors of the failed institution by diminishing available assets." Pet. App. 31a.

receiverships appointed prior to January 1, 1989." Pet. App. 25a.

In any event, petitioner's contention that FIRREA did not authorize the FDIC to succeed to former FSLIC receiverships for which FSLIC was appointed prior to August 9, 1989, is of no future significance. In Section 161(b) of the Federal Deposit Insurance Corporation Improvement Act of 1991, Congress amended the Federal Deposit Insurance Act, 12 U.S.C. 1821a (Supp. II 1990), to state:

> [e]ffective August 10, 1989, the Corporation shall succeed the Federal Savings and Loan Insurance Corporation as conservator or receiver with respect to any depository institution —
>
> > (i) the accounts of which were insured before August 10, 1989 by the Federal Savings and Loan Insurance Corporation; and
> >
> > (ii) for which a conservator or receiver was appointed before January 1, 1989.

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2286 (to be codified at 12 U.S.C. 1821a).[5] In light of Congress's

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[5] The provision states, in full:

> (b) CLARIFICATION OF FDIC POWERS IN FSLIC RESOLUTION FUND CONSERVATORSHIPS AND RECEIVERSHIPS. — * * *
>
> * * * * *
>
> "(5) CORPORATION AS CONSERVATOR OR RECEIVER. —
>
> "(A) IN GENERAL. — Effective August 10, 1989, the Corporation shall succeed the Federal Savings and Loan Insurance Corporation as conservator or receiver with respect to any depository institution—

enactment of that provision, there can be no further dispute that the FDIC is empowered to act as successor to FSLIC receiverships such as this one.

2. Petitioners contend (Pet. 16-19) that the court of appeals erred in its application of Texas state law to the particular loan documents under which it was held liable to the FDIC in this case. The court's analysis of state law does not present an issue warranting review by this Court,[6] and petitioners' claims are also mistaken.

a. Petitioners argue (Pet. 17) that the court applied a different standard for determining whether a partnership existed when one of the partners is a savings and loan association. The court of appeals, however, applied well-settled Texas state law

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> "(i) the accounts of which were insured before August 10, 1989 by the Federal Savings and Loan Insurance Corporation; and
>
> "(ii) for which a conservator or receiver was appointed before January 1, 1989.
>
> "(B) RIGHTS, POWERS, AND DUTIES. — When acting as conservator or receiver with respect to any depository institution described in subparagraph (A), the Corporation shall have all rights, powers, and duties that the Corporation otherwise has as conservator or receiver under this Act.".

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 161(b), 105 Stat. 2285-2286, amending 12 U.S.C. 1821a(a) (Supp. II 1990).

[6] See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988); *United States* v. *Hohri*, 482 U.S. 64 (1987); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976).

establishing the necessary elements of a partnership agreement. As the court of appeals noted, the Texas Supreme Court set forth the controlling law in *Coastal Plains Dev. Corp.* v. *Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978), where the court held that an expressed intent of the parties not to create a joint venture, coupled with the absence of an agreement to share losses, precluded a finding of joint venture. Pet. App. 27a. In this case, several provisions disclaim the existence of a partnership, and another provision disclaims liability of Old Vernon except to lend money to SHWC. The court of appeals properly found that these provisions clearly demonstrate the intent of the parties not to become partners.[7]

b. Petitioners also err in challenging (Pet. 17-18) the court of appeals' determination that SHWC's usury claim was barred. The court's holding rests on the application of Texas state law to the particular usury savings clause at issue in the loan documents. It reflects the fact that the parties expressed a clear intent to avoid a usurious transaction. Rather than "retrospectively changing" petitioners' contract rights (Pet. 17), the court of appeals simply held the parties to the manifest terms of the agreement.

c. Finally, petitioners err in claiming a conflict between the court of appeals' decision and *FDIC* v. *Bank of America Nat'l Trust & Savings Ass'n*, 701

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[7] Petitioners' claim that the court of appeals deviated from its earlier decision in *Minute Maid Corp.* v. *United Foods, Inc.*, 291 F.2d 577 (5th Cir.), cert. denied, 368 U.S. 928 (1961), in barring SHWC's partnership claims raises, at most, an intra-circuit conflict over Texas law, which would not require review here. In any event, in *Minute Maid*, unlike in this case, there were no express provisions disclaiming an agreement to share in losses or liability or disavowing the existence of a partnership.

F.2d 831 (9th Cir.), cert. denied, 464 U.S. 935 (1983). Petitioners apparently contend (Pet. 19) that because the court of appeals suggested that their usury claim would be invalid under federal as well as state law,[8] the decision conflicts with *Bank of America Nat'l Trust & Savings Ass'n*, which petitioners interpret as holding that state law alone determines the liability of FDIC as receiver. The proposition that state law alone determines the liability of FDIC as receiver is incorrect, see, *e.g.*, 12 U.S.C. 1823(e) (1988 & Supp. II 1990), but, in any event, petitioner misstates the holding of *Bank of America Nat'l Trust & Savings Ass'n*. The Ninth Circuit held only that when FDIC proceeds in its *corporate* capacity, federal law applies. 701 F.2d at 834.[9] There is, therefore, no conflict between the two cases.

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[8] Applying the rationale of *City of Newport*, the court of appeals stated that the FDIC receivership, which was created to serve the public interest, should not be subject to a punitive usury statute when it would only serve to punish innocent creditors of the receivership and, ultimately, innocent taxpayers. Pet. App. 31a.

[9] The Ninth Circuit noted in passing that the provision in the Federal Deposit Insurance Act that cases involving the FDIC shall be deemed to arise under the law of the United States for purposes of removal has an exception for cases in which the FDIC is acting "as receiver of a State bank," *Bank of America Nat'l Trust & Savings Ass'n*, 701 F.2d at 834, citing 12 U.S.C. 1819. That provision is irrelevant in this case because the FDIC's removal power is not at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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